RECORD AND BRIEFS

Supreme Court, U.S.
FILED
OCT 24 2016
OFFICE OF THE CLERK

No. 16-369

In the Supreme Court of the United States

COUNTY OF LOS ANGELES, CHRISTOPHER CONLEY AND JENNIFER PEDERSON,

Petitioners,

v.

ANGEL MENDEZ AND JENNIFER LYNN GARCIA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

LEONARD J. FELDMAN
Counsel of Record
TOMÁS A. GAHAN
PETERSON WAMPOLD ROSATO LUNA KNOPP
1501 4TH AVENUE, SUITE 2800
SEATTLE, WA 98101
(206) 624-6800
feldman@pwrlk.com

Counsel for Respondents

QUESTIONS PRESENTED

Deputies Christopher Conley and Jennifer Pederson shot Respondents Angel and Jennifer Mendez repeatedly after entering their home without a warrant. The Ninth Circuit below not only affirmed the district court's ruling that the officers violated clearly established Fourth Amendment law when they entered Respondents' home, it concluded that whether the officers were "plainly incompetent" was "quite debatable." App. 10a. Unlike many cases involving police shootings, Respondents had not committed a crime and were not suspected of doing so: they were simply lying on a futon in the wooden shack in which they resided. Yet as a direct result of Petitioners' unlawful conduct, Mr. Mendez was shot numerous times, his right leg was amputated below the knee, and Mrs. Mendez was shot in the back. The questions presented are:

1. Whether the Ninth Circuit's proximate cause analysis conflicts with decisions of this Court or other circuits.

2. Whether the Ninth Circuit correctly affirmed the district court's finding that the deputies' unlawful conduct proximately caused Petitioners' injuries.

3. Whether the Ninth Circuit correctly held that Petitioners are not entitled to qualified immunity.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 5

I. THE NINTH CIRCUIT'S PROVOCATION ANALYSIS DOES NOT WARRANT THIS COURT'S REVIEW 5

A. The Ninth Circuit Has Expressly Limited Its Provocation Analysis Such That Plaintiffs Must Establish The Traditional Elements Of A Section 1983 Claim, Including Proximate Cause 5

B. The Ninth Circuit's Provocation Analysis Does Not Conflict With Decisions Of This Court 7

C. The Provocation Analysis Also Does Not Conflict With Decisions Of Other Circuits 12

D. Contrary to Petitioners' Argument, The Ninth Circuit's Provocation Analysis – As Applied In This Case – Protects Both Police Officers And Innocent Individuals Like Respondents 18

II. THE NINTH CIRCUIT CORRECTLY CONCLUDED THAT RESPONDENTS CAN ALSO RECOVER DAMAGES UNDER "BASIC NOTIONS OF PROXIMATE CAUSE." 20

III. THE NINTH CIRCUIT'S QUALIFIED IMMUNITY RULING ALSO DOES NOT WARRANT REVIEW 23

IV. THIS CASE IS A POOR VEHICLE FOR REVIEWING THE CLAIMED CAUSATION ISSUES 28

CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

Cases

Alexander v. City & County of San Francisco, 29 F.3d 1355 (9th Cir. 1994) .....*passim*
Anderson v. City of Bessemer City, N.C., 470 U.S. 564 (1985) 11
Attocknie v. Smith, 798 F.3d 1252 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 2008 (2016) 13
Billington v. Smith, 292 F.3d 1177 (9th Cir. 2002) .....*passim*
Bodine v. Warwick, 72 F.3d 393 (3d Cir. 1995 ..... 12, 13, 16, 20
Burns v. PA Dep't of Corr., 642 F.3d 163 (3d Cir. 2011) 14
Carey v. Piphus, 435 U.S. 247 (1978) 10
City and County of San Francisco v. Sheehan, 135 S. Ct. 1765 (2015) 7, 16
District of Columbia v. Heller, 554 U.S. 570 (2008) 18, 19
Drumgold v. Callahan, 707 F.3d 28 (1st Cir. 2013) 14
Duran v. City of Maywood, 221 F.3d 1127 (9th Cir. 2000) 5, 6
El-Ghazzawy v. Berthiaume, 636 F.3d 452 (8th Cir. 2011) 30
Estate of Sowards v. City of Trenton, 125 Fed. Appx. 31 (6th Cir. 2005) 21

Estate of Starks v. Enyart,
5 F.3d 230 (7th Cir. 1993) 15, 16
Graham v. Connor,
490 U.S. 386 (1989) 7, 8, 9
Hayden v. Nevada Cty., AR,
664 F.3d 770 (8th Cir. 2012) 14
Hector v. Watt,
235 F.3d 154 (3d Cir. 2000) 16, 22
Herzog v. Vill. of Winnetka,
309 F.3d 1041 (7th Cir. 2002) 14
Hope v. Pelzer,
536 U.S. 730 (2002) 23
Jackson v. Sauls,
206 F.3d 1156 (11th Cir. 2000) 14
James v. Chavez,
511 Fed. Appx. 742 (10th Cir. 2013) 21
Kane v. Lewis,
604 Fed. Appx. 229 (4th Cir. 2015) 21
Kirby v. Duva,
530 F.3d 475 (6th Cir. 2008) 17
Lamont v. New Jersey,
637 F.3d 177 (3d Cir. 2011) 21
Livermore v. Lubelan,
476 F.3d 397 (6th Cir. 2007) 16, 17
Malley v. Briggs,
475 U.S. 335 (1986) 10, 26, 27
Medina v. Cram,
252 F.3d 1124 (10th Cir. 2001) 15
Memphis Cmty. Sch. Dist. v. Stachura,
477 U.S. 299 (1986) 31
Monroe v. Pape,
365 U.S. 167 (1961) 10
Paroline v. United States,
134 S. Ct. 1710 (2014) 10

Pauly v. White,
814 F.3d 1060 (10th Cir. 2016) .....*passim*
Payton v. New York,
445 U.S. 573 (1980) 21
Powers v. Hamilton Cty. Pub. Def. Comm'n,
501 F.3d 592 (6th Cir. 2007) 14
Raub v. Campbell,
785 F.3d 876 (4th Cir.),
cert. denied, 136 S. Ct. 503 (2015) 13
Ribbey v. Cox,
222 F.3d 1040 (8th Cir. 2000) 15
Saucier v. Katz,
533 U.S. 194 (2001) 23
Sigley v. City of Parma Heights,
437 F.3d 527 (6th Cir. 2006) 16
Singer v. Fulton Cty. Sheriff,
63 F.3d 110 (2d Cir. 1995) 14
Sledd v. Lindsay,
102 F.3d 282 (7th Cir. 1996) 25
Steagald v. United States,
451 U.S. 204 (1981) .....*passim*
Tennessee v. Garner,
471 U.S. 1 (1985) 9, 15
Tenorio v. Pitzer,
802 F.3d 1160 (10th Cir. 2015),
cert. denied, 136 S. Ct. 1657 (2016) 15
Tolan v. Cotton,
134 S. Ct. 1861 (2014) 23
United States v. Johnson,
256 F.3d 895 (9th Cir. 2001) 3, 9, 24
Welsh v. Wisconsin,
466 U.S. 740 (1984) 3, 9, 24

Whirl v. Kern,
407 F.2d 781 (5th Cir. 1968) 14
Yates v. City of Cleveland,
941 F.2d 444 (6th Cir. 1991) 25, 30
Young v. City of Providence ex rel. Napolitano,
404 F.3d 4 (1st Cir. 2005) 15

Statutes

42 U.S.C. § 1983 ..... *passim*

STATEMENT OF THE CASE

1. The events leading to Respondents' injuries began on October 1, 2010, when Deputies Conley and Pederson met with several other police officers to organize a search for a "parolee-at-large" named Ronnie O'Dell. According to a confidential informant, "a man fitting O'Dell's description was riding a bicycle in front of a residence owned by a woman named Paula Hughes." App. 58a ¶ 19. The officers proceeded to the Hughes residence. Acting without a warrant, the officers searched the residence, but did not find O'Dell.

Still acting without a search warrant, Deputy Pederson decided to "go ahead and clear the backyard." App. 5a. During the briefing that preceded the search of the Hughes residence, the officers were told that "a male named Angel (Mendez) lived in the backyard of the Hughes residence with a pregnant lady (Mrs. Mendez)." App. 59a ¶ 25.[1] Mr. Mendez was a high school friend of Hughes, and she had allowed him to construct and live in a shack in her backyard. Pederson admitted that she heard that announcement. App. 59a ¶ 26.

Knowing that Mr. and Mrs. Mendez lived in the shack behind the Hughes residence, Pederson

---

[1] Consistent with the district court decision, this Brief In Opposition refers to Respondent Jennifer Lynn Garcia as "Mrs. Mendez" since she and Mr. Mendez "were living together as a couple when the shooting occurred and thereafter married." App. 56a ¶ 1.

proceeded through the backyard to search the shack. She was joined by Deputy Conley, who was also present during the earlier briefing. Pederson and Conley "did not knock and announce their presence at the shack," and Conley "did not feel threatened." App. 66a ¶¶ 98, 104. With their guns drawn, Conley opened the door to the shack and pulled back the blanket used as insulation. Just as the officers had been told at the earlier briefing, Mr. and Mrs. Mendez were inside.

Mr. Mendez kept a BB gun in the shack to shoot rats, mice, and other pests. When the door opened, Mr. Mendez moved the BB gun so that he could sit up. When Conley saw the BB gun, he yelled "gun!" and the two officers then fired *fifteen* shots at Respondents. Mrs. Mendez was shot in the back, and Mr. Mendez was shot in the right arm, right shin, right hip, lower back, and left foot. Mr. Mendez's right leg was subsequently amputated below the knee.

2. Respondents sued Pederson and Conley under § 1983, alleging a violation of their Fourth Amendment rights. Relevant here, the district court found, after a bench trial, that the officers' actions were not justified by any exception to the warrant requirement and that the officers were not entitled to qualified immunity. ER 88a-99a. The court awarded roughly $4 million in damages, including over $816,000 for past medical bills and over $500,000 for future medical care for both Mr. and Mrs. Mendez and prosthesis upkeep and replacement for Mr. Mendez.

3. Petitioners appealed, and a unanimous Ninth Circuit panel affirmed. Addressing the deputies' reasons for searching the Hughes property, the Ninth Circuit noted: "Although the question is quite debatable, we will assume without deciding that the officers were not 'plainly incompetent.'" App. 10a. As "just one consideration," the Ninth Circuit explained that "[u]nless [O'Dell] was riding in circles, he would have passed the house before the officers arrived." App. 11a n.5. Additionally, "the deputies lacked any credible information that [O'Dell] was in Plaintiffs' shack." App. 14a. Indeed, Conley admitted in the district court that he "didn't have a specific belief that [O'Dell] was in fact in there." App. 37a (quoting testimony).

Based on the district court's detailed findings – and recognizing that all facts must be construed "in the light most favorable to the factfinder's verdict and the non-moving parties" (App. 7a) – the Ninth Circuit concluded that Petitioners had unlawfully searched Respondent's residence "in an attempt to execute an arrest warrant for a parolee that, at most, may have been on the property," which the court held was "contrary to" *Steagald v. United States*, 451 U.S. 204 (1981), *Welsh v. Wisconsin*, 466 U.S. 740 (1984), and *United States v. Johnson*, 256 F.3d 895, 908 (9th Cir. 2001). App. 24a (emphasis in original). The Ninth Circuit ultimately agreed with the district court that "the deputies violated clearly established Fourth Amendment law when entering the wooden shack without a warrant." App. 18a.

Turning to proximate causation, the Ninth Circuit again upheld the district court's analysis. Applying a "provocation" analysis, the Ninth Circuit agreed with the district court that "because the officers violated the Fourth Amendment by searching the shack without a warrant, which proximately caused the plaintiffs' injuries, liability was proper." App. 22a. The Ninth Circuit further held that "even without relying on our Circuit's provocation theory, the deputies are liable for the shooting under basic notions of proximate cause." App. 24a. Having so held. the Ninth Circuit affirmed the district court's judgment in favor of Respondents. App. 26a.

4. Petitioners thereafter filed a timely Petition For Rehearing En Banc, which the Ninth Circuit denied. App. 137a-138a. According to the Ninth Circuit's Order, "[t]he full court has been advised of the Petition For Rehearing En Banc and no judge of the court has requested a vote." App. 138a. Petitioners now ask this Court to review the same arguments that the Ninth Circuit unanimously rejected.

REASONS FOR DENYING THE PETITION

I. THE NINTH CIRCUIT'S PROVOCATION ANALYSIS DOES NOT WARRANT THIS COURT'S REVIEW.

A. The Ninth Circuit Has Expressly Limited Its Provocation Analysis Such That Plaintiffs Must Establish The Traditional Elements Of A Section 1983 Claim, Including Proximate Cause.

The Ninth Circuit first articulated a so-called "provocation doctrine" in *Alexander v. City & County of San Francisco*, 29 F.3d 1355 (9th Cir. 1994). In *Alexander*, police officers shot and killed a mentally ill man who had threatened to shoot the officers if they entered his house and had attempted to shoot the officers after they broke down his door. *Id.* at 1358. The Ninth Circuit held that the police could be liable for shooting the man because they "used excessive force in creating the situation which caused [the man] to take the actions he did." *Id.* at 1366. As the Ninth Circuit below noted, this analysis is sometimes referred to as the "provocation doctrine." App. 22a.

But while the Ninth Circuit has continued to refer to the analysis in *Alexander* as the "provocation doctrine," it *substantially* limited the role and effect of that rubric in *Duran v. City of Maywood*, 221 F.3d 1127 (9th Cir. 2000). The plaintiff in *Duran* argued that the district court should have instructed the jury that, under *Alexander*, the defendant police officers could violate the Fourth Amendment merely by

provoking the use of deadly force. *Id.* at 1130-31. The Ninth Circuit rejected the argument and clarified that "there must be evidence to show [1] that the officer's actions were *excessive and unreasonable*, and [2] that these actions caused an escalation that led to the shooting." *Id.* at 1131 (emphasis added). Because there was no such evidence in *Duran*, the Ninth Circuit upheld the jury's defense verdict. *Id.*

Two years later, in *Billington v. Smith*, 292 F.3d 1177, 1188 (9th Cir. 2002), the Ninth Circuit expressly recognized that it had "placed important limitations on *Alexander*." The court "read *Alexander*, as limited by *Duran*, to hold that where an officer intentionally or recklessly provokes a violent confrontation, *if the provocation is an independent Fourth Amendment violation*, he may be held liable for his otherwise defensive use of deadly force." *Id.* at 1189 (emphasis added). The court then turned to damages and explained that if a plaintiff can establish an independent Fourth Amendment violation, then "liability is established, and the question becomes the scope of liability, or what harms the constitutional violation *proximately caused*." *Id.* at 1190 (emphasis added). In short, following *Billington*, what remains are two issues: (1) whether the defendant violated the plaintiff's constitutional rights; and (2) what harms were proximately caused by that violation. These, of course, are the same *basic issues* that courts decide in all cases alleging constitutional torts.

The Ninth Circuit below applied these legal principles and adhered to the same requirements. Starting with the independent Fourth Amendment

violation required by *Billington*, the Ninth Circuit affirmed the district court's holding that "the officers violated the Fourth Amendment by searching the shack without a warrant." App. 22a. Significant here, Petitioners *do not challenge* that holding. The Ninth Circuit then turned to the proximate cause analysis – also required by *Billington* – and affirmed the district court's holding that the officers' unconstitutional conduct "proximately caused the plaintiffs' injuries." *Id.* Having analyzed both whether there was an independent constitutional violation and whether that violation proximately caused Plaintiffs' injuries, the Ninth Circuit agreed with the district court that "liability was proper" and affirmed. *Id.*

B. The Ninth Circuit's Provocation Analysis Does Not Conflict With Decisions Of This Court.

Contrary to Petitioners' argument (Pet. 16-18), the Ninth Circuit's provocation analysis does not conflict with this Court's precedent. In *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1776 n.4 (2015) (hereinafter "*Sheehan*"), the Court stated that its citation to *Alexander* and *Billington* did not suggest agreement or disagreement with those cases. Significant here, the Court did not identify any conflict between those cases and its own precedent. Nor is that surprising, as the Ninth Circuit emphasized in *Billington* that the provocation analysis "must be kept within the Fourth Amendment's reasonableness standard" as set forth in *Graham v. Connor*, 490 U.S. 386, 395 (1989), and "must be read consistently with the Supreme Court's

admonition in *Graham*" that courts must judge reasonableness "from the perspective of a reasonable officer." *Billington*, 292 F.3d at 1190 & n.73 (footnote and internal quotation marks omitted). The Ninth Circuit, in other words, appears to have recognized that the provocation analysis as set forth in *Alexander* could potentially sweep too broadly and has therefore emphasized that the doctrine must be applied consistently with *Graham*. If there was a conflict with this Court's precedent in 1994 when the Ninth Circuit first articulated the provocation analysis, it was eliminated in 2002 when the Ninth Circuit issued its opinion in *Billington*.

Ignoring the Ninth Circuit's clear admonition in *Billington* that the provocation analysis must be applied consistently with *Graham*, Petitioners nevertheless claim that the Ninth Circuit's analysis "contravenes *Graham*" because it purportedly holds police officers "civilly responsible for a *reasonable* use of force." Pet. 16 (emphasis in original). A critical flaw in this argument is that the Ninth Circuit did not find liability on an excessive force claim. App. 6a. Nor is Petitioners' use of force the "independent Fourth Amendment violation" required by *Billington*. Instead, as the Ninth Circuit explained, the basis for liability was the district court's finding that "the officers violated the Fourth Amendment by searching the shack without a warrant, which proximately caused the plaintiffs' injuries." App. 22a. *Graham* does not address unlawful entry claims, which is the sole claim at issue here.

The Ninth Circuit below also did not apply *Graham* to Respondents' unlawful entry claim. App. 22a-24a. Instead, it relied principally on (1) *Steagald v. United States*, 451 U.S. 204, 211-12 (1981), which holds that a warrantless entry into a home to conduct a search is unreasonable "[a]bsent exigent circumstances," (2) *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984), which holds that the state's hot pursuit argument was "unconvincing because there was no immediate or continuous pursuit of the petitioner from the scene of a crime," and (3) *United States v. Johnson*, 256 F.3d 895, 908 (9th Cir. 2001), which forbids "warrantless searches while investigating a suspect's whereabouts." App. 24a. Those cases, unlike *Graham*, address whether and when police can conduct warrantless searches, which is the basis for liability here. App. 22a.

Moreover, nothing in *Graham* precludes lower courts from considering all of the facts and circumstances in deciding Fourth Amendment claims. To the contrary, the Court emphasized that "the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application" and that "its proper application requires careful attention to the facts and circumstances of each particular case." *Graham*, 490 U.S. at 396 (internal quotation marks omitted). Quoting *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985), the Court reiterated that the question is "whether the totality of the circumstances justifie[s] a particular sort of ... seizure." *Graham*, 490 U.S. at 396. The Court thus required lower courts to carefully consider *all* of the relevant facts and circumstances and *did not hold* that any facts

or circumstances should be ignored in deciding Fourth Amendment claims. Indeed, as discussed in Section I.C below, several lower courts have expressly noted that any such limitation would be inconsistent with the "totality of the circumstances" approach inherent in the Court's reasonableness standard for Fourth Amendment claims.

The Ninth Circuit's analysis of the proximate cause issue – as required by *Billington* and in accordance with basic principles of tort law (the underlying principles are the same) – also does not conflict with this Court's precedent. As the Ninth Circuit noted, this Court has expressly held that § 1983 "'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.'" App. 24a (quoting *Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986), and *Monroe v. Pape*, 365 U.S. 167, 187 (1961)). Quoting *Paroline v. United States*, 134 S. Ct. 1710, 1719 (2014), the Ninth Circuit added that "[p]roximate cause is often explicated in terms of foreseeability or the scope of the risk created by the predicate conduct," and the analysis is designed to "preclude liability in situations where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity." App. 24a; *see also Carey v. Piphus*, 435 U.S. 247, 254 (1978) ("the basic purpose of a § 1983 damages award should be to compensate persons for injuries *caused by* the deprivation of constitutional rights" (emphasis added)). Here too, there is no conflict between the Ninth Circuit's analysis and this Court's precedent.

What remains is a factual issue. Mr. Mendez testified at trial that he had just fallen asleep before he heard "the door come open on the shed," which caused him to "come out of bed and ... lift the gun off the bed" "*in reaction* to the door coming open." Dkt. 246 at 6:9-17, 7:9-15, 8:3-7, 9:18-20 (emphasis added). When asked if he "would describe [his] movement in getting out of the bed as a fast one," Mr. Mendez replied. "Yes, because I was startled." *Id.* at 13:2-4. After hearing this testimony and the testimony of the officers, the district court found that when the officers opened the door to his residence, Mr. Mendez moved his BB gun "so that he could put his feet on the floor of the shack and sit up" and that this movement caused Pederson and Conley to fire their weapons. App. 68a-69a ¶¶ 119, 127. This evidence amply supports the district court's ruling that "the conduct of Deputies Conley and Pederson was the proximate cause of Mr. and Mrs. Mendez's injuries." App. 126a-127a. To set aside this finding, Petitioners must establish – and the Court must find – that it is "clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witness." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573 (1985). Petitioners do not even attempt to make that showing. Even if they had, that is hardly the sort of issue that warrants this Court's review.

C. The Provocation Analysis Also Does Not Conflict With Decisions Of Other Circuits.

The Ninth Circuit's provocation analysis also does not conflict with decisions in other circuits. Contrary to Petitioners' argument (Pet. 18-19), Justice (then Circuit Judge) Alito's opinion in *Bodine v. Warwick*, 72 F.3d 393 (3d Cir. 1995), provides strong support for the Ninth Circuit's analysis below. In *Bodine*, the Third Circuit made clear that an officer's liability for unlawful conduct is to be determined by "basic principles of tort law." *Id.* at 400. As a result, police officers who illegally enter a suspect's home "would not be liable for harm produced by a 'superseding cause.'" *Id.* Conversely, "the troopers would be liable for the harm 'proximately' or 'legally' caused by their tortious conduct." *Id.* (emphasis added). The Ninth Circuit's provocation analysis, as discussed in Section I.A above, is no different in that respect: it holds police officers liable for harm that is proximately caused by their unlawful conduct.

The Third Circuit in *Bodine* also provided a hypothetical, instructive here, where there is both an illegal entry claim and an excessive force claim. The court held that if the jury were to determine "that the troopers' entry was unlawful, it will be necessary to determine how much of the injury suffered by Bodine was proximately or legally caused by the illegal entry." 72 F.3d at 400. The court also recognized that while the illegal entry and excessive force claims are separate, "[t]he harm proximately caused by these two torts may overlap." *Id.* at 400-01. Regardless of any such

overlap, the police officers are liable for whatever harm was proximately caused by their unlawful conduct. That is precisely what the lower courts held in this case: "the officers violated the Fourth Amendment by searching the shack without a warrant" and that conduct "proximately caused the plaintiffs' injuries." App. 22a.

Other circuits agree. In *Pauly v. White*, 814 F.3d 1060, 1072 (10th Cir. 2016), the Tenth Circuit specifically addressed "pre-seizure conduct and proximate cause" and concluded – like the Third Circuit in *Bodine* and the Ninth Circuit below – that "Officers Mariscal and Truesdale may be held liable if their conduct immediately preceding the shooting was the but-for cause of Samuel Pauly's death, and if Samuel Pauly's act of pointing a gun at the officers was not an intervening act that superseded the officers' liability." In *Attocknie v. Smith*, 798 F.3d 1252 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 2008 (2016), the court likewise held that "because a reasonable jury could determine that the unlawful entry was the proximate cause of the fatal shooting of Aaron, we need not decide whether Cherry used excessive force when he confronted Aaron." *Id.* at 1258 (internal citation omitted). Other courts have likewise held that § 1983 claims are governed by basic principles of tort law, including proximate cause.[2] Indeed, Respondents

---

[2] *See, e.g.*, *Raub v. Campbell*, 785 F.3d 876, 881 n.6 (4th Cir.) ("Section 1983 imposes liability not only for conduct that directly violates a right but for conduct that is the effective cause of another's direct infliction of the constitutional injury") (internal quotation marks omitted), *cert. denied*, 136

(continued . . .)

are not aware of – and Petitioners have not cited – a § 1983 case that *rejects* those legal principles, which, as noted above, apply in all cases alleging constitutional torts.

Rather than focus on the independent Fourth Amendment violation at issue and the Ninth Circuit's proximate cause analysis, Petitioners raise a wholly distinct issue: the "segmented

---

(. . . continued)
S. Ct. 503 (2015); *Drumgold v. Callahan*, 707 F.3d 28, 48 (1st Cir. 2013) ("As a general rule, we employ common law tort principles when conducting inquiries into causation under § 1983." (internal quotation marks omitted)); *Hayden v. Nevada Cty., AR*, 664 F.3d 770, 773 (8th Cir. 2012) (plaintiff "must present evidence from which a reasonable jury could conclude that [Mormon's] statements were the proximate cause of the violation of his constitutional right"); *Burns v. PA Dep't of Corr.*, 642 F.3d 163, 181 (3d Cir. 2011) ("the plaintiff in a § 1983 case must prove that a constitutional violation has occurred, and that it was the proximate cause of his or her injuries"); *Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592, 608 (6th Cir. 2007) ("Traditional tort concepts of causation inform the causation inquiry on a § 1983 claim."); *Herzog v. Vill. of Winnetka*, 309 F.3d 1041, 1044 (7th Cir. 2002) ("ordinary rules of tort causation apply to constitutional tort suits"); *Jackson v. Sauls*, 206 F.3d 1156, 1168 (11th Cir. 2000) ("§ 1983 defendants are, as in common law tort suits, responsible for the natural and foreseeable consequences of their actions"); *Singer v. Fulton Cty. Sheriff*, 63 F.3d 110, 116 (2d Cir. 1995) ("award of damages must always be designed to *compensate injuries* caused by the [constitutional] deprivation") (emphasis and alteration in original, internal quotation marks omitted); *Whirl v. Kern*, 407 F.2d 781, 789 (5th Cir. 1968) (§ 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions").

approach" to excessive force claims. As Petitioners note, some courts have held that excessive force claims should be viewed in "segments" and that courts should disregard earlier segments when determining whether an officer used excessive force in a later segment (Pet. 18-22) while other courts have held that "[t]he reasonableness of [an officer's] actions depends both on whether the officers were in danger at the precise moment that they used force and on whether [the officer's] own reckless or deliberate conduct during the seizure unreasonably created the need to use such force." *Tenorio v. Pitzer*, 802 F.3d 1160, 1164 (10th Cir. 2015) (internal quotation marks omitted), *cert. denied*, 136 S. Ct. 1657 (2016). Courts have emphasized that this latter approach "is most consistent with the Supreme Court's mandate that we consider these cases in the 'totality of the circumstances.'" *Young v. City of Providence ex rel. Napolitano*, 404 F.3d 4, 22 (1st Cir. 2005) (quoting *Garner*, 471 U.S. at 8-9). Numerous other courts have adopted this approach.[3]

---

[3] *See, e.g., Medina v. Cram*, 252 F.3d 1124, 1132 (10th Cir. 2001) ("[t]his approach is simply a specific application of the 'totality of the circumstances' approach inherent in the Fourth Amendment's reasonableness standard," quoting *Garner*, 471 U.S. at 8-9); *Ribbey v. Cox*, 222 F.3d 1040, 1043 (8th Cir. 2000) (finding fact issues regarding an excessive force claim based on evidence that the officer caused the conduct (the suspect "turn[ed] reflexively down and away from the breaking window" and thereby appeared to be "reaching for a weapon") that arguably permitted the use of deadly force); *Estate of Starks v. Enyart*, 5 F.3d 230, 234 (7th Cir. 1993) (officer cannot lawfully use deadly force to protect

(continued . . .)

Respondents recognize, of course, that the Court stated in *Sheehan* that "[t]he Ninth Circuit's 'provocation' rule ... has been sharply questioned elsewhere." 135 S. Ct. at 1776 n.4 (citing *Hector v. Watt*, 235 F.3d 154 (3d Cir. 2000), and *Livermore v. Lubelan*, 476 F.3d 397 (6th Cir. 2007)). But the cases cited in *Sheehan* do not undermine the Ninth Circuit's analysis here. Starting with *Hector*, the court there did not cite *Alexander* nor did it discuss the Ninth Circuit's provocation analysis. The opinion also predates *Billington*, which "placed important limitations on *Alexander*." 292 F.3d at 1188. Substantively, the court in *Hector* followed *Bodine* (discussed *supra* at 12-13) and similarly held that § 1983 actions for Fourth Amendment violations are governed by basic principles of proximate causation, including "the concept of intervening causes." 235 F.3d at 160. The Ninth Circuit, as noted *supra* at 10-11, correctly recognized and applied those legal principles.

In *Livermore*, in contrast, the Sixth Circuit expressly questioned the Ninth Circuit's analysis in *Billington* (476 F.3d at 406), but whether there is a conflict between the two circuits is not clear. In *Livermore*, the court held that "[t]he proper approach under Sixth Circuit precedent is to view

---

(. . . continued)
himself if he "unreasonably created the encounter that ostensibly permitted the use of deadly force"); *Sigley v. City of Parma Heights*, 437 F.3d 527, 534–35 (6th Cir. 2006) (citing *Starks* with approval and recognizing, as in *Starks*, that "determining whether the officer placed himself in danger is a factual inquiry that should be resolved by the factfinder").

excessive force claims in segments" and "disregard" events in earlier segments when determining whether an officer used excessive force in a later segment. *Id.* at 406-07. But the Sixth Circuit subsequently held in *Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008), that "[w]here a police officer unreasonably places himself in harm's way, his use of deadly force may be deemed excessive." That is the more recent and better reasoned approach, and numerous courts have similarly so held. *See supra* at 15-16 & n.3. Over time, the Circuits can be expected to reach consensus on that point, and the Court should allow that process to continue.

In the meantime, this case does not require the Court to choose between a "segmented" approach, on the one hand, and a "totality of the circumstances" approach, on the other, because the Ninth Circuit did not find liability on an excessive force claim. App. 22a. As a result, the Ninth Circuit never addressed whether it is appropriate or inappropriate to consider events in earlier segments when determining whether Conley and Pederson used excessive force after they entered Respondents' residence. The dispositive issue in this case was not whether Respondents should prevail on an excessive force claim, but rather what damages were *proximately caused* by the deputies' illegal entry into Respondents' residence. The only case cited by Petitioners that addresses that issue is *Pauly* (Pet 29-30), which provides strong support for the Ninth Circuit's causation analysis. *See supra* at 13 and *infra* at 21. The other cases cited by Petitioners did not address that issue, nor did they abandon basic principles of tort law in

determining what damages are proximately caused by an officer's independent Fourth Amendment violation. The Ninth Circuit properly applied those legal principles, and its ruling does not conflict with decisions of other circuits.

D. Contrary to Petitioners' Argument, The Ninth Circuit's Provocation Analysis – As Applied In This Case – Protects Both Police Officers And Innocent Individuals Like Respondents.

Petitioners conclude their discussion of the Ninth Circuit's provocation analysis by claiming that the analysis "puts the lives of officers at risk." Pet. 23. But in so arguing, Petitioners continue to misapprehend the Ninth Circuit's analysis in this case. As the Ninth Circuit explained, the independent Fourth Amendment violation at issue in this case is the unlawful entry into Respondents' home. App. 18a ("the deputies violated clearly established Fourth Amendment law when entering the wooden shack without a warrant"); App. 22a ("the officers violated the Fourth Amendment by searching the shack without a warrant"). If officers recognize – as this Court has held – that "the Fourth Amendment has drawn a firm line at the entrance to the house" (*Steagald*, 451 U.S. at 212 (internal quotations marks omitted)), they are far less likely to enter a home to conduct a warrantless search (as Petitioners did here).

Such a result *protects* officers. The Court has long recognized the constitutional right to use arms to protect a home. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Court stated:

> [T]he inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. *The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute.*

Id. at 628 (emphasis added). The Ninth Circuit below recognized this risk as well (App. 24a-25a), as did the Tenth Circuit in *Pauly* (814 F.3d at 1072-73). Far from putting the lives of officers at risk, the Ninth Circuit's analysis protects police officers from the consequences of rushing into a person's home without a warrant, without exigent circumstances, and without probable cause – as happened here.

Finally, enforcement of Fourth Amendment rights also respects the search warrant process, the purpose of which "is to allow a neutral judicial officer to assess whether the police have probable cause to ... conduct a search." *Steagald*, 451 U.S. at 212. This important constitutional checkpoint acknowledges that officers are "engaged in the often competitive process of ferreting out crime" and "may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual's interests in protecting his own liberty and the privacy of his home." *Id.* This, too, is a strong reason to deny the Petition.

II. THE NINTH CIRCUIT CORRECTLY CONCLUDED THAT RESPONDENTS CAN ALSO RECOVER DAMAGES UNDER "BASIC NOTIONS OF PROXIMATE CAUSE."

In addition to finding liability under the provocation doctrine, the Ninth Circuit below held that "even without relying on our Circuit's provocation theory, the deputies are liable for the shooting under basic notions of proximate cause." App. 24a. Petitioners argue that this holding is legally incorrect and raises "a substantial issue for this Court to answer." Pet. 33-34.

The cases cited by Petitioners (Pet. 34-35) do not support their argument. As noted previously, the Third Circuit in *Bodine* recognized that unlawful entry claims, like other § 1983 claims for violations of constitutional rights, are governed by "basic principles of tort law." 72 F.3d at 400; *see also supra* at 12-13. As a result, the plaintiff must establish that the officers' unlawful conduct proximately caused harm and the officers "would not be liable for harm produced by a superseding cause." 72 F.3d at 400 (internal quotation marks omitted). These are intensely factual issues, which is why the Third Circuit in *Bodine* remanded the matter for a new trial and did not decide the proximate cause and superseding cause issues as a matter of law. *Id.* at 401. The Third Circuit did not, as Petitioners urge here, find superseding cause as a matter of law. Indeed, such a holding would allow police officers to unlawfully enter a home, shoot a resident who understandably responds in a "threatening" manner, and then

avoid liability *in all cases* based on superseding cause principles. Such a rule would undermine "the very core of the Fourth Amendment," which is the right to "retreat into [one's] own home and there be free from unreasonable governmental intrusion." *Payton v. New York*, 445 U.S. 573, 589-90 (1980) (alterations and citation omitted).

The other cases cited by Petitioners confirm that this issue turns on the facts of each case. In *Kane v. Lewis*, 604 Fed. Appx. 229, 237 (4th Cir. 2015), the victim of the police shooting knew that the men who entered the apartment were police officers "yet advanced toward them with a knife." In *James v. Chavez*, 511 Fed. Appx. 742, 750 (10th Cir. 2013), the victim of the police shooting knew that police were at his door and yet deliberately attempted "to stab a police officer." In *Lamont v. New Jersey*, 637 F.3d 177, 186 (3d Cir. 2011), the victim was both "noncompliant" and "threatening." In *Estate of Sowards v. City of Trenton*, 125 Fed. Appx. 31, 41 (6th Cir. 2005), the victim knew that police officers were kicking down his door and yet threatened the officers with a handgun when they gained access. In *Pauly*, in contrast, the court found fact issues regarding the superseding cause analysis because it was unclear whether the officers properly identified themselves and whether the victims of the police shooting believed the officers were intruders rather than state police. 814 F.3d at 1074. The rule that emerges from these cases is that *knowingly* and *intentionally*

attacking a police officer can be an intervening act that supersedes the liability of the officer.[4]

Here, in contrast, there is no evidence to support such a defense. Petitioners, for their part, "violated the Fourth Amendment by searching the shack without a warrant" (App. 22a), and they do not argue otherwise. The record also establishes that they "did not knock and announce their presence at the shack." App. 66a ¶ 98.[5] Respondents, in turn, did not knowingly or deliberately attack the officers, and Petitioners again make no such argument. Instead, as the district court found, Mr. Mendez "thought it was Ms. Hughes" opening the door and "picked up the BB gun rifle to put it on the floor" so that he could sit up. App. 68a ¶¶ 118-19. This conduct – along

---

[4] Petitioners also cite *Hector* (Pet. 35), but the plaintiff in that case alleged an unlawful search and seizure claim and not an unlawful entry claim, the court noted that the police officers "are not alleging that any of Hector's conduct counts as an intervening cause," and the court ultimately declined to reach the intervening cause issue. 235 F.3d at 160-61.

[5] Petitioners claim that they "bear no responsibility for failing to identify themselves before opening the door to the shed" because the Ninth Circuit concluded that they are entitled to qualified immunity on the knock and announce claim. Pet. 30. Here again, Petitioners misapprehend the Ninth Circuit's ruling: the failure to knock and announce is not a separate basis for liability but rather one of the facts and circumstances that properly informs the lower courts' proximate cause analysis. App. 25a ("the situation in this case, where Mendez was holding a gun when the officers barged into the shack *unannounced*, was reasonably foreseeable" (emphasis added)).

with the shooting itself – was a direct consequence of Petitioners' unlawful actions, and the Ninth Circuit correctly concluded that they are responsible for the resulting harm to Respondents under basic notions of proximate cause. App. 24a.

III. THE NINTH CIRCUIT'S QUALIFIED IMMUNITY RULING ALSO DOES NOT WARRANT REVIEW.

Petitioners also attack the Ninth Circuit's qualified immunity analysis. Pet. 23-33. In deciding this issue, courts engage in a two-pronged inquiry. Under the first prong, courts must examine whether the facts "[t]aken in the light most favorable to the party asserting the injury ... show the officer's conduct violated a [federal] right." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Under the second prong, courts ask whether the right at issue was "clearly established" at the time of the alleged misconduct. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). The Court recently emphasized that, in deciding *both* prongs, all inferences must be drawn in favor of the non-moving party. *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (*per curiam*) ("Our qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-established prong of the standard.").

Both prongs are satisfied here. As to the first prong, the Ninth Circuit recognized that the search took place "one hour" after O'Dell had last been seen, there was "no immediate or continuous pursuit of the subject," and "the deputies lacked any credible information that [O'Dell] was in

Plaintiffs' shack." App. 13a-14a (internal quotation marks omitted). On this record, the Ninth Circuit correctly concluded that the deputies' conduct was contrary to *Steagald* (451 U.S. at 211-12), *Welsh* (466 U.S. at 753), and *Johnson* (256 F.3d at 908). *See supra* at 9 (discussing Ninth Circuit's analysis and supporting case law). As to the second prong of the qualified immunity analysis, this Court decided *Steagald* in 1981 and *Welsh* in 1984, and the Ninth Circuit decided *Johnson* in 2001. The right at issue was therefore clearly established, at the appropriate level of specificity, at the time of the officers' misconduct.

Petitioners' qualified immunity argument is misdirected at best. They claim, for example, that the Ninth Circuit failed to analyze whether the officers should have expected that their conduct was likely to provoke a violent response. Pet. 27. But that is not the constitutional violation at issue (the first prong of the qualified immunity analysis). Instead, the constitutional violation at issue, as noted previously, is searching Respondents' residence without a warrant in the absence of exigent circumstances, which is contrary to this Court's opinions in *Steagald* and *Welsh* and the Ninth Circuit's opinion in *Johnson*. App. 24a (discussed *supra* at 9). The Ninth Circuit's provocation analysis, as limited by *Billington*, merely provides a familiar framework for determining liability where, as here, a plaintiff alleges a constitutional tort: (1) did the defendant violate the plaintiff's constitutional rights and (2) what harms were proximately caused by that violation? *See supra* at 6. That analytical

framework is not the proper focus of either prong of the qualified immunity test.

Other Circuits have similarly focused on the constitutional violation that allegedly caused harm. In *Sledd v. Lindsay*, 102 F.3d 282, 288 (7th Cir. 1996), for example, the Seventh Circuit held:

> Viewed in the light most favorable to Sledd, the evidence shows that Baker's act of shooting Sledd at the top of the stairs was unjustified, even assuming that the police still had some right of self defense after they had broken into the house and failed to identify themselves or to announce their purpose. In short, Sledd's evidence shows that the police officers behaved in an objectively unreasonable fashion and were therefore not entitled to qualified immunity.

And in *Yates v. City of Cleveland*, 941 F.2d 444, 447 (6th Cir. 1991), the Sixth Circuit likewise held:

> It was not 'objectively reasonable' for Currie to enter the dark hallway at 2:45 a.m. without identifying himself as a police officer, without shining a flashlight, and without wearing his hat. Thus, because the right Officer Currie is alleged to have violated was clearly established, and because Officer Currie's actions preceding the shooting were not those of an objectively reasonable police officer, we conclude that qualified immunity is not appropriate.

Here too, the Ninth Circuit below correctly focused on whether "the deputies violated clearly established Fourth Amendment law when entering the wooden shack without a warrant." App. 18a.

But even if it were necessary to consider the provocation issue for purposes of qualified immunity, those legal principles are also clearly established. Since at least 2002 – when the Ninth Circuit decided *Billington* – it has been clearly established in the Ninth Circuit that if a plaintiff can establish an independent Fourth Amendment violation then "liability is established, and the question becomes the scope of liability, or what harms the constitutional violation proximately caused." *Billington*, 292 F.3d at 1190.[6] Rejecting a similar qualified immunity argument in *Pauly*, the Tenth Circuit squarely held that "it has been clearly established since 2006 that for an officer to be liable under Section 1983, the officer's conduct must be both a but-for and proximate cause of the plaintiff's constitutional harm." 814 F.3d at 1075-76. Likewise, it has been clearly established since at least 1986 – when this Court decided *Malley* –

---

[6] Petitioners also argue that *Billington* requires a "violent response" whereas Mr. Mendez did not respond violently. Pet. 31. In *Billington*, the Ninth Circuit used the phrase "violent confrontation," not "violent response." 292 F.3d at 1189. In addition, as the Ninth Circuit below explained, Petitioners' argument on this point is "unpersuasive" because it would mean that victims of police violence are entitled to damages under the provocation doctrine if they point a weapon at police and shout "I'll kill you," but "would be out of luck" if they were merely "holding a BB gun and didn't intend to threaten the police." App 23a. That makes no sense.

that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Malley*, 475 U.S. at 344 n.7. Lower courts uniformly agree that § 1983 claims are governed by basic principles of tort law, including proximate cause. *See supra* at 13-14 n.2. Whether analyzed under the Ninth Circuit's provocation rubric or basic notions of proximate cause – the Ninth Circuit below did both – the controlling legal principles have been clearly established for decades.

Petitioners next claim that "[a] reasonable officer would not expect to find residents living in a dilapidated shed, which appeared uninhabitable." Pet. 27. Putting aside the fact that this argument ignores the rights and circumstances of impoverished individuals, the district court expressly rejected this argument based on the evidence at trial:

> Having listened to the testimony and examined numerous photographs of the Hughes property, the Court finds that this perception of Deputies Conley and Pederson was not reasonable. They had been told that the shack was inhabited. The shack was a different structure than the [storage] sheds. The shack was in a different location. The following were all indicia of habitation: The air conditioner, electric cord, water hose, and clothes locker.

App. 67a ¶ 106 (emphasis added); *see also* App. 60a-62a ¶¶ 39-57 (describing shed). The district

court's findings are reviewed for "clear error" (*see supra* at 11), and Petitioners have not even attempted to establish such error. Nor can they.

The same evidence, along with the evidence and findings set forth on page 11 above, also refutes Petitioners' argument that they could not have reasonably anticipated that entering such a structure would provoke a violent confrontation and that what happened here was merely "an unfortunate coincidence." Pet. 32. Based on the information available to Petitioners before they illegally entered Respondents' home, the district court found that a reasonable officer would have known that a violent confrontation was "foreseeable." App. 126a-127a. The Ninth Circuit likewise concluded that "the situation in this case, where Mendez was holding a gun when the officers barged into the shack unannounced, was reasonably foreseeable." App. 25a. That, too, is an intensely factual issue and does not remotely warrant this Court's review.

IV. THIS CASE IS A POOR VEHICLE FOR REVIEWING THE CLAIMED CAUSATION ISSUES.

Even if Petitioners could establish that the Ninth Circuit has adopted a proximate cause analysis that conflicts with the decisions of other circuits or with the decisions of this Court (which they cannot), the Petition should be denied because this case is a poor vehicle for reviewing the claimed causation issues. That is so for at least the following reasons:

1. Rather than presenting a clear legal issue for the Court's consideration, Petitioners are rearguing their version of the facts. Petitioners do not take issue (nor can they) with the Ninth Circuit's ruling that "[b]ecause this case involves the deputies' renewed assertion of qualified immunity after judgment, we recite the following facts in the light most favorable to the nonmoving parties and the factfinder's verdict" (App. 3a), yet they repeatedly present the facts in the light most favorable to their own arguments. They claim, for example, that they did not expect to find residents living in the shack, yet they were told beforehand that "a male named Angel (Mendez) lived in the backyard of the Hughes residence with a pregnant lady (Mrs. Mendez)" and the shack had an air conditioner, electric cord, water hose, and clothes locker. App. 59a ¶ 25; App. 67a ¶ 106. They also claim that the confrontation with Respondents was not foreseeable, but the district court – following a bench trial – found that it was. App. 126a-127a. Petitioners assert numerous other "facts" that are not only contrary to the district court record but are material to the formulation and resolution of the Questions Presented in their Petition. Such factual disputes do not warrant this Court's review.

2. The Ninth Circuit's analysis is manifestly correct and does not rely solely on the court's provocation doctrine. As noted previously, the Ninth Circuit squarely held that Petitioners "violated the Fourth Amendment by searching the shack without a warrant" (App. 22a), and Petitioners do not argue otherwise. Instead, the central issue in the case is whether Petitioners'

conduct proximately caused Respondents' injuries, and there is ample evidence supporting the district court's ruling that "the conduct of Deputies Conley and Pederson was the proximate cause of Mr. and Mrs. Mendez's injuries." App. 126a-127a. Not only is that an intensely factual issue, reviewed solely for clear error, the Ninth Circuit expressly held that "even without relying on our Circuit's provocation theory, the deputies are liable for the shooting under basic notions of proximate cause." App. 24a. Because the provocation doctrine is not outcome determinative here, the Court should decline review.

3. Far from putting the "lives of officers at risk" (Pet. 23), Petitioners' arguments – if accepted by this Court – would seriously threaten officer safety. *See supra* at 18-19. The Eighth Circuit squarely rejected a similar "officer safety" argument as follows: "Counsel may shout 'officer safety' until blue-in-the-face, but the Fourth Amendment does not tolerate, nor has the Supreme Court or this Court ever condoned, pat-down searches without some specific and articulable facts to warrant a reasonable officer in the belief that the person detained was armed and dangerous." *El-Ghazzawy v. Berthiaume*, 636 F.3d 452, 460 (8th Cir. 2011) (internal quotation marks and citation omitted). In *Yates*, the Sixth Circuit similarly held that "[a]n officer who intentionally enters a dark hallway in the entrance of a private residence in the middle of the night, and fails to give any indication of his identity, is more than merely negligent." 941 F.2d at 447. The same reasoning applies where, as here, police officers search a

home without a warrant, without exigent circumstances, and without identifying themselves as police officers. And these considerations are no less important when victims of a police shooting live in circumstances that others might consider "uninhabitable." Pet. 27.

4. The equities in this case overwhelmingly favor the district court's liability determination and damages award. The Ninth Circuit expressly found that whether the officers were "plainly incompetent" was "quite debatable." App. 10a. Respondents, in contrast, had not committed a crime and were not suspected of doing so. They were simply lying on a futon in the wooden shack in which they resided. App. 56a ¶ 2. Yet as a direct result of Petitioners' unlawful conduct, Mr. Mendez was shot numerous times, his right leg was amputated below the knee, and Mrs. Mendez (pregnant at the time) was shot in the back. Respondents' damages are substantial: they include over $816,000 for past medical bills and over $500,000 for future medical care for both Mr. and Mrs. Mendez and prosthesis upkeep and replacement for Mr. Mendez. App. 53a-54a. The result in this case is fair and just and, absent further review, will appropriately deter similar violations of Fourth Amendment rights. *See Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 310 (1986) ("Section 1983 presupposes that damages that compensate for actual harm ordinarily suffice to deter constitutional violations."). For this reason too, the Ninth Circuit's analysis does not warrant this Court's review.

CONCLUSION

For the foregoing reasons, the Petition For A Writ Of Certiorari should be denied.

Respectfully submitted,

LEONARD J. FELDMAN
Counsel of Record
TOMÁS A. GAHAN
PETERSON WAMPOLD ROSATO LUNA KNOPP
1501 4TH AVENUE, SUITE 2800
SEATTLE, WA 98101
(206) 624-6800
feldman@pwrlk.com

Counsel for Respondents

OCTOBER 24, 2016